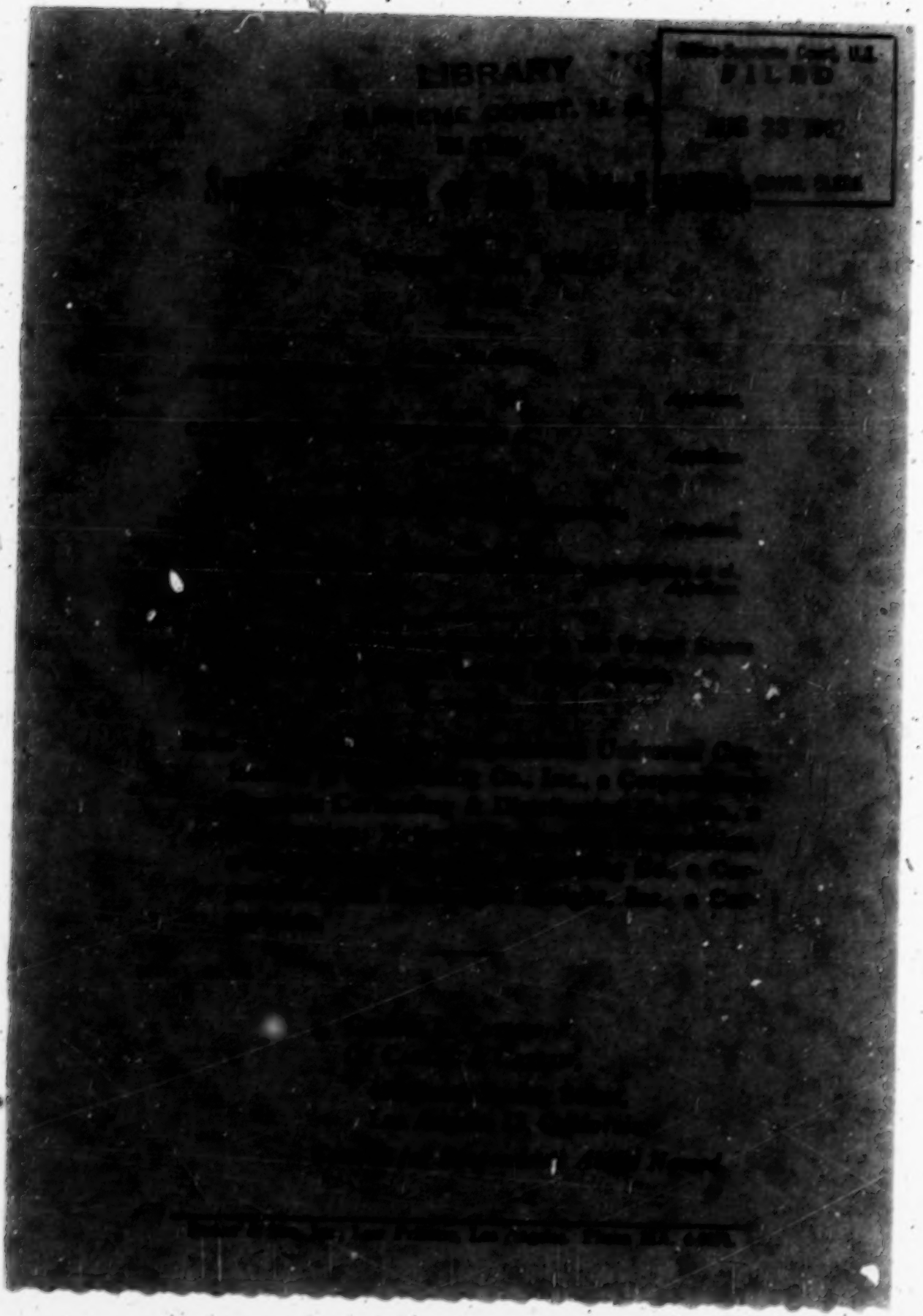

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 222

Case No. 17235

PENSICK & GORDON, INC.,

Appellant,

vs.

CALIFORNIA MOTOR EXPRESS, *et al.*,

Appellees.

Case No. 7380

PENSICK & GORDON, INC., a California corporation,

Appellant,

vs.

CALIFORNIA MOTOR EXPRESS, LIMITED, a corporation, *et al.*,

Appellees.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Brief in Opposition for Respondents Universal Carloading & Distributing Co., Inc., a Corporation; Republic Carloading & Distributing Co., Inc., a Corporation; National Carloading Corporation, a Corporation; Western Carloading Co., a Corporation; and Acme Fast Freight, Inc., a Corporation.

Opinions Below.

The Order of Dismissal of District Judge Byrne, dismissing petitioner's first amended complaint [2 Tr. 192-193] dismissed the action as to all defendants, including these freight forwarder respondents. The opin-

ion of the Court of Appeals for the Ninth Circuit has not been recorded, but is printed and attached as Appendix "A" to the petition herein.

Jurisdiction.

The jurisdictional requisites to review the opinion of the Court of Appeals are adequately set forth in the petition.

Statutes Involved.

The pertinent provisions of the Interstate Commerce Act (Part II—Motor carriers) controlling interstate motor carriers (49 U. S. C. A.; §316(b); (d) and (j)) are set forth in the petition at pages 4 through 6.

The correlative statutes, as to freight forwarders, are as follows (Interstate Commerce Act Part IV):

49 U. S. C. A., Section 1004(a) and (b).

"§1004. RATES, CHARGES, AND PRACTICES.

(a) It shall be the duty of every freight forwarder to provide and furnish, upon reasonable request therefor, the service subject to this part [§§1001-1022 of this title] covered by its permit issued under this part [§§1001-1022 of this title], and to establish, observe, and enforce just and reasonable rates and charges therefor and just and reasonable classifications, regulations and practices relating thereto and to the issuance, form, and substance of receipts and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation in service

subject to this part [§§1001-1022 of this title], and facilities for such transportation, and all other matters relating to or connected with such transportation, and every unjust or unreasonable rate, charge, classification, regulation, or practice is prohibited and declared unlawful.

(b) It shall be unlawful for any freight forwarder, in service subject to this part [§§1001-1022 of this title], to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, port district, gateway, transit point, locality, region, district, territory, or description of traffic in any respect whatsoever; or to subject any particular person, port, port district, gateway, transit point, locality, region, district, territory, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice of disadvantage in any respect whatsoever; Provided, That this subsection shall not be construed to apply to discriminations, prejudice or disadvantage to the traffic of any carrier of whatever description."

However, there is no section corresponding to 49 U. S. C. A. §316(j) (Interstate Commerce Act, Part II) in Part IV of the Interstate Commerce Act (Freight Forwarders), 49 U. S. C. A. §1001 *et seq.*

Questions Presented.

Whether the United States District Court has jurisdiction to determine matters calling for the exercise of administrative power and discretion of the Interstate Commerce Commission.

Statement of the Case.

This litigation concerns the pickup and delivery of freight at petitioner's place of business. From the present state of the record, petitioner's premises was being picketed by members of the Teamsters' Union and respondents' truckdrivers were members of the same Teamsters' Union. Respondents' agents and employees individually refused to cross the picket line and deliver freight at petitioner's premises. [2 Tr. 130-137.] Petitioner brought this action for damages.

The United States District Court determined that it did not have jurisdiction and dismissed the action (No. 17380) as to all respondents. The United States Court of Appeals affirmed the order of the District Court. (Appendix "A" of the petition.)

Argument.

Pursuant to the Interstate Commerce Act, Parts II and IV, whether a particular rate is reasonable and whether a particular practice is reasonable is an administrative question with the exclusive primary jurisdiction vested in the Interstate Commerce Commission. The Interstate Commerce Act comprehends a scheme for federal regulation of common carriers, motor carriers and freight forwarders, so that uniformity of regulation might be had under the supervision of the expert and specialized knowledge of said Commission.

> "Whether a carrier has without justification failed to provide reasonable and non-discriminatory service is a question of defining the carrier's duty in the framework of the National Transportation Policy." (*Carpenters' Union v. Labor Board*, 357 U. S. 93, 110 (1958).)

In *T.I.M.E. v. United States*, 359 U. S. 464 (1959), in construing the instant statutes, it was held that they created only a criterion for administrative application rather than creating a legal right for shippers.

> "It is obvious from the whole setting of the Motor Carrier Act that Congress pre-empted this field of control over the motor carrier type of Interstate Commerce. It is abundantly clear that Congress intended regulatory controls to be exercised by the Commission and not by or through individuals. There is absolutely no indication in this Act or in case law that private suits might be resorted to, to aid the Commission in its enforcement of the Act and the regulation thereunder." (*Consolidated Freightways v. United Trucklines* (9 Cir., 1954), 216 F. 2d 543, at page 547.)

Commencing with *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426 (1907), this Court has recognized the exclusive primary jurisdiction of the Interstate Commerce Commission and has affirmed that principle as to rates in the *T.I.M.E.* case, *supra*, and as to particular practices in the *Carpenters'* case, *supra*.

The Court of Appeals' decision herein has re-affirmed these principles and said decision is not in conflict with decisions of Courts of Appeals in different Circuits arising since the decisions of this Court in the *T.I.M.E.* and *Carpenters'* cases, *supra*.

That Congress intended the Court of Appeals' construction of the Interstate Commerce Act is clearly shown by applicable sections of Part IV thereof:

Section 1003(a) (49 U. S. C. A.) grants to said Commission the authority to make and amend rules and regulations, and Section 1003(b) grants to said Commission the authority to establish reasonable requirements for continuous and adequate service. (49 U. S. C. A., §1003(a) and (b), Appendix A.)

49 U. S. C. A., Section 1006(a) provides a sole remedy for an alleged violation of Part IV of the Interstate Commerce Act by freight forwarders: Any person may lodge a complaint with the Commission, which, on finding a reasonable ground for investigation, shall investigate the matter complained of by proper means. Section 1006(b) provides for a proceeding and a determination by the Commission of the lawful rate thereafter to be charged or the lawful "practice thereafter to be made effective." (49 U. S. C. A., §1006 (a) and (b), Appendix B.)

Conclusion.

Petitioner's arguments and fears are without merit and are unfounded. It is respectfully urged that the opinion of the United States Court of Appeals for the Ninth Circuit is right and that the petition should be denied.

Respectfully submitted,

GEORGE L. CATLIN
Of CATLIN & CATLIN,
Attorneys for Freight Forwarders, Appellees and Respondents.

APPENDIX A.

49 U. S. C. A., Section 1003. GENERAL POWERS AND DUTIES OF COMMISSION:—(a) It shall be the duty of the Commission to administer the provisions of this part [§§1001-1022 of this title], and to that end it shall have the authority to make and amend such rules and regulations and to issue such orders as may be necessary to carry out its provisions.

(b) The Commission shall have authority to establish reasonable requirements with respect to continuous and adequate service.

APPENDIX B.

49 U. S. C. A., 1006. COMMISSION'S AUTHORITY OVER RATES AND PRACTICES.—(a) Any person may make complaint in writing to the Commission that anything done or omitted to be done by any freight forwarder is or will be in violation of this part [§§1001-1022 of this title]. Every complaint shall state fully the facts complained of and the reasons for such complaint. If such freight forwarder shall not satisfy the complaint within a time specified by the Commission, or there shall be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

(b) Whenever, upon hearing, upon complaint or in an investigation on its own initiative, the Commission shall be of opinion that any rate or charge demanded, charged, or collected for service subject to this part [§§1001-1022 of this title], or any classification, regulation, or practice relating thereto, is or will be unjust or unreasonable or unjustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of any provision of this part [§§1001-1022 of this title], it shall determine and prescribe the lawful rate or charge or the maximum or minimum, or maximum and minimum, rate or charge thereafter to be observed, or the lawful classification, regulation, or practice thereafter to be made effective.